Supreme Court, U.S.
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In The
Supreme Court
of the United States

October Term, 1998

Clark Z. Couch,
Petitioner,

v.

Department of Fish and Wildlife
for the State of Oregon,
Respondents.

Petition For A Writ Of Certiorari
To The Supreme Court
Of The State of Oregon

PETITION FOR A WRIT OF CERTIORARI

Clark Z. Couch
P.O. Box 23
Ashwood, Oregon 97711

Petitioner, Pro Se

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ISSUES PRESENTED

1. Petitioner's right to property has been violated by the State with intentional deprivation and without a legitimate governmental interest.

2. Petitioner animals have been claimed property of the State by invalid statutue.

3. Petitioner's interest in property was violated by Administrative rules which changed licensing criteria which petitioner had continuously met.

4. Prodedural due process was violated by agency hearing officer's error and denied Petitioner a new hearing. Agency hearing officer was bias against Petitioner and hearing officer was claimed incompetence and did not recuse himself.

LIST OF PARTIES

The Caption contains the names of all parties to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Oregon.

DECISIONS BELOW

The decision of the State of Oregon Department of Fish and Wildlife Agency Hearing No. 61701 is reproduced in the Appendix beginning at p. 1. Page references are to the version in the Appendix.

The decision of the State of Oregon Court of Appeals Case No. A99126 is reproduced in the Appendix beginning at p. 14.

The decision of the State of Oregon Supreme Court for review is reproduced in the Appendix beginning at p.15

The decision of the State of Oregon Supreme Court for reconsideration is reproduced in the Appendix beginning at p. 16.

The appellate judgment of the State of Oregon Appeals Court is reproduced in the Appendix beginning at p.17.

JURISDICTION

The Final Appellate Judgment in the Court of Appeal of the State of Oregon was entered on March 25, 1999

In accordance with Supreme Court Rule 13, this petition for certiorari is timely filed. This case involves a constitutional challenge to property rights and to certain provisions of the State of Oregon Administrative Code, as well as rights retained by the people. As such the federal courts have jurisdiction pursuant to 28 U.S.C. § 1331.

This petition is being filed in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Due Process Clause of the Fourteenth Amendment Section 1 Clause 3 of the United States Constitution provides in part:

[N]or shall any State deprive any person of life, liberty, or property without due process of the law. Further

The Tenth Amendment of the United States Constitution provides that ..."The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

This petition involves the constitutional challenge of the Due Process that the State of Oregon Department of Fish and Wildlife (ODFW) violated, by regulation of private property without proper authority, and by Oregon Administrative Rule and State Statutes that claims "wildlife" is property of the State, thereby claiming Petitioner's private property as State property. Furthermore Petitioner challenges that the most basic right retained by the People, is the right to conduct business and earn a livelihood which has been abrogated. Petitioner also challenges that he was not afforded procedural due process.

A. Procedural History

Petitioner has tried to protect his business, by contesting the Oregon Department of Fish and Wildlife's Administrative Rules which regulate to the point of

prohibiting and by contesting State statutes that claim ownership.

Petitioner requested an Agency hearing to contest the license denial. Petitioner contends that ODFW is regulating animals beyond their jurisdiction and that their regulations have not served as the means to accomplish their wildlife protection plan. ODFW failed to provide a fair and reasonable hearing. Petitioner stated that the hearing was not fair and requested a new hearing which was denied.

Petitioner requested a review with the Oregon Court of Appeals, which confirmed the Agency's decision without an opinion. Petitioner again argued that fair notice was not afforded and that the agency was attempting to regulate animals beyond their jurisdiction.

Petitioner requested a review by the Oregon Supreme Court, which denied a review.

Petitioner requested a reconsideration of review by the Oregon Supreme Court, which again denied a review.

B. The Case

Petitioner has been in litigation with the Oregon Department of Fish and Wildlife (ODFW) since 1988. This agency is attempting to put the Petitioner out of business by regulationing to the point of prohibiting. Petitioner Mr. Clark Z. Couch is owner of a Game Ranch in the State of Oregon that has been a continuously licensed operation, in good standing since 1956. According to ODFW, Petitioner has the only known hunting game ranch in Oregon. ODFW has made Administrative Rules that are contrary to Oregon Legislative intent. Petitioner has exhausted all remedies in attempt to protect his business. ODFW will not provide fair and unbias hearings, nor will they define "wildlife" in relation to Petitioner animals. The State of Oregon claims, by state

statute, that all "wildlife" is property of the State, even those animals that are privately owned. Petitioner has always handled his operation in a business like manner, has worked successfully with the Oregon Department of Agriculture (ODA), and has attempted to work with ODFW. ODFW has a bias commission who has stated they are philosophically opposed to game ranching and thereby has set out to regulate Petitioner out of business.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 list out reasons for considering review on Writ of Certiorari, specifically rule 10 (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;. and rule 10 (c) a state court has decided an important federal question in a way that conflicts with relevant decisions of this court. All of these grounds for review are present in this case.

I. THE STATE'S CLAIM THAT THEY OWN ALL "WILDLIFE" IS IN DIRECT CONFLICT WITH THIS COURTS DECISIONS AND THE CONCLUSIONS OF OTHER STATES.

This court has determined that the State does not own all wildlife. In *Hughes v. Oklahoma, 441 U.S. 322 (1979)* the court has stated that those animals which have been reduced to possession, are not property of the State. These animals once reduced to possession are then recognized as private property, along with all the enjoyments and entitlement there of. Oregon Administrative Rules do not discern between private property and the State's property. ODFW claims their Administrative Rules were written to protect the States

wildlife from disease and inter-breeding. ODFW Administrative Rules allowed certain cervids to be raised and sold in a commercial setting. Cervids are cervids regardless of the species and all have the potential to spread the same diseases. The Director of ODFW has agreed that some cervid species have "no adverse effect on Oregon's wildlife", yet ODFW has denied Petitioner the right to retain and buy those cervid species, while other citizens have been allowed to retain and buy them. The Honorable Judge Steven J. Mura stated in *Rich v. Smitch Whatcom County Washington* 93-2-00781-3 (1994) "In light of strong herding instincts of the two species of deer in question, the court cannot find that the risks to native servids[sic] from these diseases is any greater from the plaintiffs farmed deer than cattle and dairy cows." Therefore the means which ODFW is using to protect the State's wildlife does not reach the end. They have restricted some commercial owners of cervids, but not all. They refuse to recognize private ownership, or that the cervids are private property.

The following States all recognize "privately owned" game mammals as private property, contrary to Oregon:

Alabama,	New York
Colorado	Ohio
Indiana	Tennessee
Kansas	Utah
Montana	Wisconsin
Nevada	

Therefore this is of a national private property interest. Can a State agency regulate private property to the point of prohibition, when that private property has a custom and usage of over 40 years? Furthermore a custom and usage without any harm to the State's wildlife. Can ODFW change a licensing scheme that has been in existence for over 60

years, to exclude it's only Licensee? ODFW has done all this simply with the word "wildlife" and without defining the word "wildlife". Oregon has deprived private cervid owners of their property rights by radically changing the face of the Wildlife Propagation Laws without legislative approval.

II. AGENCIES BEYOND THEIR JURISDICTION IS A VIOLATION OF PUBLIC TRUST AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

ODFW has exceeded it's statutory authority in regulating private property to the point of prohibition, when this was not the Oregon Legislatures intent. This is a violation of public trust and is a matter of national concern as it affect citizens of other States as well as Oregon. Oregon Legislature never intended for "game breeders" to be under the jurisdiction of the ODFW, they have always been under the jurisdiction and regulations of the Oregon Department of Agriculture (ODA). Now ODFW has prohibited some privately owned cervids and have disallowed hunting of all. Agencies that exceed their jurisdiction have been addressed by the Federal District Court and D.C. Circuit Court of Appeals in *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399. Therein an agency tried to enforce "unreasonable" regulations that were "in excess of statutory jurisdiction". ODFW rules prohibiting some cervids was under the guise that there is a potential risk to the State's wildlife, but allowing private ownership of some cervid species and not others is unreasonable. The risk is *de minimis* at best, as there is no known harm on record in the State of Oregon, even with Petitioner's animals being present in the State for over 40 years. This is discriminating regulations, that violate Petitioner's rights of ownership of private

property. ODFW is beyond their statutory authority to regulate, by claiming privately owned cervids as "wildlife". Furthermore ODFW's Administrative Rules now prohibits the hunting of privately owned cervids, thereby making it illegal to hunt on your own private property if you own cervids, whereas any other land owner may hunt for the State's cervid on their private property. This is a undue deprivation of private property rights and is discriminating. One of the most fundamental rights of ownership of land is the right to kill game on ones own land. "Killing game on ones own land is a right of ownership" *Inst. Just. bk 2pt 1.* This right has been upheld since Roman times, right on through to the rights of american citizens and this is made evident as stated in *State v. Mallory* 73 Ark. 236. Now ODFW has stripped that right from every land owner in the State, if you happen to own cervids.

III. AGENCY HAS ABROGATED RIGHTS NOT ENUMERATED TO THE STATE, BUT THOSE THAT HAVE BEEN RETAINED BY THE PEOPLE.

While certain rights are enumeration in the Constitution, those that have not are retained by the People. "A most basic right retained by the people is the right to conduct business and earn a livelihood, so long as such efforts are not unlawful under valid exercise by government of its police power authority." *Rich v. Smitch Whatcom County Washington* 93-2-00781-3 (1994) . Game Ranching has always been a lawful business in the State of Oregon. Petitioner's business has been continuously licensed since 1956. Legislature enacted this occupational license for game breeders thereby recognizing it as a lawful and legal business. ODFW's cannot demonstrate that an actual harm exists from Petitioner's game ranch. To regulate to the point of

prohibition without an actual harm is a right not enumerated to the State. Again the State's means does not meet the end.

IV. PROPERTY INTEREST IN LICENSE VIOLATED BY ADMINISTRATIVE RULE IS IN CONFLICT WITH THIS COURT.

Petitioner's business has had a Game Breeders License since 1956 and a Wildlife Propagation License since the license's creation in 1973. Petitioner has a lawful, licensed business that has been in operation since 1956. Petitioner has a property interest in his license, and a reasonable expectation to continue to profit from it.

ODFW arbitrarily without legislative approval changed the licensing scheme to prohibit Petitioner's business entirely. ODA has stated that there has been no known disease transmission or crossbreeding of privately owned cervids to the State's wildlife in Oregon's History. ODA by state statute regulates all animals for disease control. Any potential risk would be addressed by ODA's State Veterinarian not ODFW. If any threat of disease existed in privately owned animals, then only ODA under their Police Powers delegated by Oregon Legislature, could eliminate them from the State. ODWF has passed Administrative Rules to eliminate Petitioner's business on the basis of potential disease transfer to the State's wildlife, when in fact only ODA has statutory authority and expertise in disease control. ODFW has no basis for their action, since there is no known damage to the State's wildlife from Petitioner's business. Petitioner has always complied with ODA requirements regarding his business and any ODFW requirements regarding the Wildlife Propagation License. It is reasonable for the Petitioner to expect his license to continue. Petitioner has invested a substantial amount of assets into his business for

improvement and for on going maintenance.

Petitioner has 2500 acres of his property fenced, that met prior licensing requirements. Now ODFW has made a rule of a 300 acre limit on the facility size for cervids. The fact that the ODFW denied Petitioner's license because he was unable to meet the rule requiring him to have ground level observation of all animals from one location on his facility is in it's self a violation of a legal maxim ("Maxims are the condensed good sense of nations"). LEX NON COGIT AD IMPOSSIBLIA- The law does not seek to compel a man to do that which he cannot possibly perform. Because of the terrain of Petitioner's land it would be impossible for him to comply with this rule. Where the law creates a duty and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will excuse him. So the fact that it is an impossibility for the Petitioner to comply, alone excuses him from the rule, but also one must consider that there is not any scientific information to justify the rule. The fact that the ODFW has arbitrarily regulated him out of business is a deprivation of property.

V. PROCEDURAL DUE PROCESS WAS VIOLATED BY STATE AGENCY.

Petitioner has not been afforded a fair and unbias hearing. Petitioner had grounds for a new hearing and was refused by the Oregon Court of Appeals. Petitioner requested a new hearing after having tapes destroyed by the Administrative Law Judge (ALJ), after discovery that the ALJ was bias and unfair in his determination and then after the ALJ admitted that he was incompetent to perform his duties. The Appeals court refused a new hearing thereby the Petitioner was not afforded the forum necessary to present his case. The due process clause of the fourteenth amendment

guarantees procedural due process, and it must be fair and unbias. This was not the case with the Petitioner, even the notice of hearing was given without revealing the subject matter to be discussed. This court has held that a person shall have an "evidentiary hearing with an effective opportunity to defend oneself by confronting adverse witnesses and by presenting ones own arguments and evidence orally before an impartial decision maker,..." *Goldberg v. Kelly*, 397 U.S. 254.

CONCLUSION

The ODFW can not make rules that change or misuse any definition or intent or law that has been set by the legislature. " an administrative agency may not, by its rules, amend alter, enlarge or limit the terms of a legislative enactment" *U. of O. Co-Oper. v. Dept. of Rev.*, 273 Or 539, 550 Therefore, no board policy could override the statute." When the ODFW makes rules and changes statutes that are clearly beyond Legislative intent, they are in fact taking on the function of Legislature. They are using political and philosophical views in deciding what they think is best for the citizens of this State. This is a direct violation of public trust, and violate Petitioners right to property.

The ODFW has given themselves jurisdiction over privately owned cervids by using an Attorney General Opinion *[39 Op Atty Gen* 728,729 (1979) Oregon]. This opinion simply states if an animal can survive on it's own in the "wild" it is "wildlife", no matter if it is captive or not. ODFW has now expanded "wildlife to include all non-native animals such as sheep, goats and hogs. By using this opinion they called all privately owned captive animals "wildlife" and have used ORS 498.002 to assent jurisdiction. ORS 498.002 states that "all wildlife is property of the state". Petitioner contends that privately owned cervids are not "wildlife" and

are not property of the State.

Furthermore the agency hearing was held without proper notice, and the evidence is clear by the fact that the notices that were mailed did not contain all required information to insure that the Petitioner was afforded a fair and unbias hearing. Petitioner prayerfully seeks a review by this court.

Respectfully submitted,

Clark Z Couch June 18 1999

Clark Z. Couch *pro se*
P.O. Box 23
Ashwood, Oregon 97711

Petitioner

BEST AVAILABLE COPY

App. 1

IN THE DEPARTMENT OF FISH AND WILDLIFE

OF THE STATE OF OREGON

CLARK Z COUCH
PO BOX 23
ASHWOOD OR 97711

CASE #: 61701

IN THE MATTER OF APPLICATIONS	)	
	)	
FOR CERVID HOLDING PERMIT AND	)	
	)	
CERVID PROPAGATION LICENSE	)	FINAL ORDER
	)	
FOR	)	
	)	
THE ABOVE-NAMED PETITIONER	)	

On January 24, 1996, the Oregon Department of Fish and Wildlife (ODFW), hereinafter referred to as the Department, issued to Petitioner a Notice of Proposed Facility Exemption Denial and Application Denial for both a Cervid Holding Permit and a Cervid Propagation License, under the provisions of Oregon Administrative Rules (OAR) Chapter 635, Division 49, based on the Department's belief that Petitioner's proposed exemption to the maximum facility size requirement did not meet requirements of OAR 635-49-140(3), that Petitioner did not own certain cervid species before January 20, 1993, and that Petitioner's application indicated that hunting was to be allowed on the facility.

Pursuant to notice duly given, two hearings were held, one January 22, 1997, at 10:00 a.m., and the second on February 10, 1997, at 1:00 p.m., both at the DMV Hearings

Program Office in Beaverton, Oregon. Petitioner appeared without counsel at both hearings. The Department appeared at the hearing through counsel, Jane Ard, Assistant Attorney General with the Oregon Department of Justice. Robert L. Goss of the DMV Hearings Program, at the request of the Department, presided as the Administrative Law Judge (ALJ). Petitioner testified at the hearing. Testifying on behalf of the Department were Dan Edwards, Game Program Manager for the Department; Steve George, Cervid Facilities Inspection Coordinator with the Department; and Senior Trooper Mark Prodzinski of the Oregon State Police.

The ALJ issued a Proposed Order on April 11, 1997. The Proposed Order gave the parties 20 days in which to file exceptions. The Department did not file exceptions. Mr. Couch did file exceptions. Those exceptions have been considered in reaching this Final Order.

PETITIONER'S CONTENTIONS

Petitioner contends that:

1. The Department has no authority to regulate "privately owned" cervids;

2. Petitioner's animals were "grandfathered" into the existing scheme of regulation, and therefore they should be exempt from regulation; and

3. Petitioner's Wildlife Propagation License, another ODFW license not at issue at this hearing, would allow him to keep cervids, under its definition of "game animals."

EVIDENTIARY RULINGS

At the original hearing on January 22, 1997, Exhibits #1 through #50 were received. After the close of the hearing, and after all parties had left, the Administrative Law Judge (ALJ) discovered, due to an error on his part, that part of one side of an audio tape (Tape #2) of the hearing had mistakenly

been taped over. Specifically, the ALJ taped on the side one of tape #2, turned the tape over and recorded on side two, then instead of obtaining another tape, mistakenly turned tape #2 over again, taping over about half of side one with the last part of the hearing. Therefore, the beginning of side one of tape #2 was missing, recorded over by what is labeled on that tape as "side three".

After discovering the error, the ALJ contacted Petitioner and counsel for the Department, and a new hearing was agreed upon for February 10, 1997, in order to reconstruct what was missing from Tape #2. copies of the existing tapes were made and sent to Petitioner and counsel for the Department before the new hearing. Specifically, what was missing from tape #2 was the last part of one of the Department's witness's direct questioning by counsel for the Department, and most of Petitioner's cross-examination of that witness (Dan Edwards).

On February 10, 1997, the new hearing convened, Mr. Edwards went back through the missing part of his earlier testimony, all exhibits discussed previously were received into record, as well as subsequent documentation, (Exhibits #1 through #54) and Petitioner was given full opportunity to re-question Mr. Edwards. Also, at the February 10, 1997, hearing, the record was left open to allow both Petitioner and the Department to submit closing briefs on the issues at the hearing, and Petitioner, at his request, was given an additional opportunity to supplement the record with additional evidence on the issue of genetic testing of the cervids involved here, but Petitioner did not subsequently submit any further evidence.

The Department contacted the ALJ by phone after the hearing, asking for an extension of time to submit its closing brief, in part due to the fact that counsel for the Department left the Attorney General's Office a few days after the

February 10, 1997, hearing, and the new counsel needed extra time to review the brief. The extension was granted through February 26, 1997. The ALJ sent a letter to Petitioner dated February 21, 1997 (Exhibit #56), in response to an earlier letter from Petitioner (Exhibit #55). The ALJ's letter discussed the genetic testing evidence, and notified Petitioner that the ALJ had granted the extension to the Department for its closing brief, and granted Petitioner the same extension, two days beyond his original date of February 24, 1997. Both the Department and Petitioner then submitted closing briefs in a timely manner, which are received into the record as Exhibits #57 and #58, respectively.

Petitioner then sent the ALJ yet another document on February 26, 1997, entitled "objection to Plaintiff's Motion for Extension of time to file Findings of Fact Conclusions of Law." The document is received as Exhibit #59. The ALJ assumed that the Petitioner's reference to "Plaintiff" in Exhibit #59 is in fact a reference to the Department (ODFW). Petitioner's objection to the time extension is overruled. Exhibits #1 through #59 have been received, and the record is now closed.

Having fully considered the matter, the Department makes the following:

FINDING OF FACT

1. "Cervids" are those species of animals contained within the family Cervidae, commonly referred to as the "deer" family, which also includes elk and moose.

2. In 1993, the Oregon Fish and Wildlife Commission adopted OAR Chapter 635, Division 49, which regulates the private propagation of cervid species. The rules were designed to answer concerns of the Commission and the Department regarding the health and integrity of native cervid species. (Exhibit # 45-Page 4). The rules mandate specific requirements for obtaining a Cervid Holding Permit and a

Cervid Propagation license, including size restrictions for the facilities used to hold the animals.

3. Petitioner had held certain cervids in a private facility before 1993, under the previous ODFW licensing scheme, which did not before 1993 specifically address cervids. Petitioner challenged the validity of the above-noted new rules in federal court in 1995. On June 9, 1995, the court determined that the rules were a proper exercise of the state's power to promote and protect its native wildlife (Exhibit #45). Petitioner also alleged in his federal court action that the state's rules constituted a "taking" of his cervid operation. The court ultimately dismissed that claim without prejudice, leaving Petitioner to properly set up that claim by having the Department first deny his application for a Cervid Holding Permit and a Cervid Propagation License.

4. In June of 1995, Petitioner applied to the Department for both a Cervid Holding Permit and Cervid Propagation license. Both applications were for the same 2,408-acre facility, consisting of seven pastures. Petitioner's application for the Cervid Holding Permit (Exhibit #30-Page 3 of 23), states that the type of business of the facility was "Hunting Ranch-Cervid Breeding-Farming." The animal inventory included with the Cervid Holding Permit application (Exhibit #30-Pages 3 through 12) lists elk, Axis deer, and moose as being possessed by Petitioner at that time. Petitioner also included in that inventory pages for Muntjac deer, Mule deer, Barasingha deer, Blacktail deer, Pere David deer, and Sanbar deer, but the pages do not indicate any actual animals of those species as being possessed by Petitioner at that time. Petitioner's application for a 1995 Cervid Propagation License (Exhibit #30-Page 13), lists individual fallow deer and Sika deer in his inventory. No reindeer were listed as being possessed by Petitioner at that time.

5. The applications also included a Facility Variance Plan

prepared by Petitioner (Exhibit #30-Pages 14 and 15), which was an attempt by Petitioner to gain an exception to the 300-acre maximum facility size requirement. Petitioner's plan describes the fencing of his facility, and also indicated that the elk in the facility could not be observed on a daily basis, due mainly to the topography of the facility. Daily observability is a requirement for a facility size exemption of this kind. Later inspection of the facility by a Department employee, Steve George, and the testimony of Petitioner at hearing, both indicated that the daily observability requirement could not be met. Petitioner's plan also stated that two of the pastures designated for the facility are fenced for hunting cervids (Exhibit #30-Page 14).

6. Upon receipt of the application for the Cervid Holding Permit and the Cervid Propagation License, the Department wrote back to Petitioner on July 20, 1995 (Exhibit #33), and reiterated the facility size exemption requirement, i.e., that the facility be constructed and maintained to allow for ground level observation of all animals held on the facility on a daily basis. The letter informed Petitioner that the facility plan submitted by him did not adequately address or explain how the observability goal would be met. Petitioner was told that without further explanation, the Department Director could not consider or grant an exemption, the Department would consider such a scheme, provided that Petitioner supplement and amend his applications toward that end.

7. The July 20, 1995, letter from the Department to Petitioner raised other concerns about Petitioner's applications that are not allowed under the cervid rules or were not in his possession as of January 20, 1993. Specifically, Petitioner listed Sika deer under his Cervid Propagation license application, when the rule allows Sika deer to be held only under Cervid Holding Permit. The Department told Petitioner that it would propose amending the applications, to include

Sika deer on the Cervid Holding Permit, and remove Sika deer from the Cervid Propagation license, leaving only fallow deer on that license.

The Department also raised the issue of the animals listed on the Cervid Holding Permit application which Petitioner did not posses at the time, or did not posses before January 20, 1993, and did not have a Wildlife Propagation license to possess on or before that date. The Department proposed removing Muntjac deer, Mule deer, Barasingha deer, Blacktailed deer, Pere David's deer and Sanbar deer. The Department also proposed removing the moose from Petitioner's Cervid Holding Permit application, because it was not in Petitioner's possession before January 20, 1993. Finally, the Department asked Petitioner for more information regarding Axis deer, some information regarding genetic testing for the elk, and also informed Petitioner that hunting, as described by Petitioner as the type of business for the facility, was prohibited by Department rule. Petitioner was told that when the above issues were adequately addressed, the Department would be willing to grant preliminary approval for the Cervid Holding Permit and Cervid Propagation License, and facility inspection would then be required before the final permit and license could be issued.

8. On July 28, 1995, the Department received a letter from Petitioner (Exhibit #34), taking issue with the fact that the Department's earlier July 20, 1995, letter was written by someone other than Dan Edwards, the Department's Game Program Manager.

9. On July 28, 1995, the Department sent Petitioner a letter (Exhibit #35), written by Dan Edwards, indicating to Petitioner that all future correspondence could be sent to him. The balance of the letter identical to the Department's above-noted july 20, 1995, letter.

10. On September 12, 1995, Dan Edwards of the

Department wrote another letter to Petitioner (Exhibit #36, asking again for more information about Petitioner's facility size exemption request, or in the alternative, a detailed plan regarding how Petitioner would plan to meet the 300-acre size requirement. Petitioner was told that failure to provide more information regarding facility size exemption by October 1, 1995, would mean the Department would recommend the facility size exemption request be denied, and if the Department did not receive information regarding the alternative 300-acre size requirement by October 15, 1995, his applications for Cervid Holding Permit and Cervid Propagation License would be denied.

11. In response to the Department's letter of September 12, 1995, Petitioner wrote back to Mr. Edwards later that month (Exhibit #37), taking issue with the Department's observability requirements and the issue of when Petitioner obtained his moose.

12. On January 24, 1996, the Department issued to Petitioner Orders denying Petitioner's 1995 applications for a Cervid Holding Permit and a Cervid Propagation Permit, denying Petitioner's accompanying facility size exemption request (Exhibit #42).

13. On March 4, 1996, Petitioner sent to the Department a letter (Exhibit #43, stating that he was contesting the "Two letters sent to me on January 17th and January 24th." The January 24, 1996, "letter" contained the two Orders of denial at issue here, and the January 17, 1996, "letter" contained a denial of another license of the Petitioner's from ODFW, Specifically a Wildlife Propagation License, not at issue here. (See Exhibit #38.)

14. To date, Petitioner has not provided the Department with the earlier requested genetic testing results, nor has he provided adequate information regarding his request for a facility size exemption or the hunting of cervids on the

facility.

CONCLUSIONS OF LAW

1. The Oregon Fish and Wildlife Commission has the authority to promulgate rules to regulate the holding and propagation of cervids, privately held or otherwise. OAR Chap. 635, Division 49 is a valid and proper extension of that authority, and the Department can validly administer those rules.

2. The Department's denials of Petitioner's 1995 application for a Cervid Holding Permit and a Cervid Propagation License, and denial of Petitioner's companion request for a facility size exemption in regards to those applications, are valid.

OPINION

Petitioner's contentions regarding this matter are almost totally legal and not factual. As to the specific factual items raised by the Department as violations of its requirements for a Cervid Holding Permit and Cervid Propagation License (hunting on the facility, failure to establish a facility size exemption, and failure to provide genetic testing results), Petitioner has provided no substantive evidence to dispute these facts. The Department has clearly proved that under its rules, as currently promulgated, the permit and license at issue should be denied.

Petitioner's actual articulated basis for requesting this hearing is to set up a denial of the above permit and license, therefore providing him with standing to proceed with his actual contention, that the Department cannot in any way regulate his "privately owned" cervids.

Petitioner believes strongly that there is a difference between cervids that are "privately held" and "privately owned." Petitioner believes "privately held" refers to animals that he believes belong to the state, but are "held" privately. "Privately owned," according to Petitioner, refers to animals

owned by Petitioner and other private entities. The basis for this distinction is unclear. Petitioner apparently means to suggest that regulations that affect his "privately owned" cervids constitute an unlawful "taking" by the state.

However, review of Petitioner's evidence, and the law, leads to a different conclusion. "Privately held" and Privately owned" are terms without a difference, at least for purposes of the Department's regulatory scheme as set out in OAR Chap. 635, Division 49. Accordingly, the Department has full authority to regulate all cervids within the state, privately held, privately owned, or otherwise.

Neither the Commission nor the Department "owns" these animals, at least in the sense alleged by Petitioner. The state has the authority to regulate private activities that affect wildlife, the same as the state can regulate private activities involving many other areas that concern it. The Department's authority stems from the general statutory authority of the Oregon Fish and Wildlife Commission to implement laws and rules for the management of wildlife. The Commission has been given specific authority to adopt "rules and standards as it considers necessary and proper to implement the policy and objectives of ORS 496.012 and perform the functions vested by law in the commission." Oregon Revised Statue (ORS) 496.138(2). The Department, through the Director, administers those laws and rules promulgated by the Commission. ORS 496.118. OAR Chap. 635, Division 49 is a reasonable exercise by the Commission towards its stated goals of wildlife management, and the Department's administration and interpretation of those rules also appear reasonable. The federal court's reasoning in its decision regarding Petitioner's original challenge to the Division 49 rules is persuasive. ***Couch v. ODFW***, U.S. District Court of Oregon, Civ. No. 94-6052-TC. The court found that the rules "represent a proper exercise of the state's power to promote

and protect its native wildlife." Id at 1. Petitioner's argument is not persuasive.

Petitioner's argument that he was "grandfathered" into cervid permit and license scheme (which he believes should mean that he therefore is exempt from its requirements) is not persuasive. Petitioner adds that this should mean that the "legal" license to raise game animals is his original Wildlife Propagation License, not the subsequently created Cervid Holding Permit and License at issue here. The Department's closing brief on this point states very well the ultimate conclusion of this Order:

> "Nothing in ORS 497.228, or in the other wildlife statues, prohibits the commission from adopting a separate scheme for one category of game animals, in its case cervids. Division 44, OAR 635-44-00 specifically identifies the regulation of cervid holding and propagation under Division 49 rules as simply a subset of the wildlife propagation license. The commission has not reclassified cervids as nongame mammals. Rather, the commission developed separate types of licenses and permits for a specific and identifiable group of animals whose holding and propagation could impact native deer and elk." (Exhibit #57-Page 8)

Petitioner also raised at hearing other specific procedural issues which should be addressed here. First. Petitioner at the beginning of the hearing stated that he was never made aware of the subject of the hearing, stating that he thought the hearing was in regards to his Wildlife Propagation License, not the Cervid Holding Permit and Cervid Propagation License. However, Petitioner specifically mentioned in his notice contesting these actions the date of the Denials at issue here. See Exhibit #42, Pages 3 and 5, and Exhibit #43. Petitioner was also sent, 12 days before the first hearing on January 22, 1997, a copy of the Department's opening brief,

which described in detail the actions proposed to be discussed at the hearing, and listed the specific statues and rules on which the Department based its actions. While Petitioner had also earlier asked for a hearing on a separate, non-cervid license (Wildlife Propagation License), Petitioner had more than adequate notice that this hearing would be about the cervid actions. The Department has stated, on record at this hearing, that a hearing for the Wildlife Propagation License will proceed after the conclusion of this matter. It should also be pointed out that Petitioner, due to error of the ALJ regarding taping of the original hearing, was given more than two additional weeks after the first hearing to prepare for the subject matter of this hearing, since he was given a second opportunity to question the Department's main witness on February 10, 1997.

Petitioner also contends that he did not receive notice of the hearing rights and procedures (Exhibit #49) until just before the hearing. Petitioner was not unduly prejudiced, and the giving of the notice just prior tot he hearing was in compliance with the Administrative Procedures Act (APA). ORS 183.413(2) requires that such notice be given "prior to the commencement of the contested case hearing." Petitioner was given ample opportunity to supplement the record after the hearing with any additional evidence he wished to provide, and as stated above, he was given more than two additional weeks after the hearing to further become aware of the APA rights and procedures, before reconvening for an additional hearing with the Department's main witness for re-questioning. Petitioner was also sent, 12 days before the first hearing, copies of all exhibits the Department proposed to submit, a description of the Statutes and rules used, and a statement from the Department that it intended to call witnesses on its behalf (Exhibit #44). Petitioner had more than adequate notice of the hearing, was aware of all the

documents the Department wished to submit, and knew that witnesses could be called. Petitioner's procedural arguments are not persuasive.

ORDER

1. The Department denies Petitioner's application for a 1995 Cervid Holding permit and 1995 Cervid Propagation License, and also denies Petitioner's companion request for a facility size exemption regarding those applications.

2. Petitioner shall comply with the requirements of OAR 635-49-130 regarding the disposition of the cervids at issue here, within 60 days of the issuance of the Final Order in this matter.

/s/ James W. Greer
Jim Greer
Director

ISSUANCE AND MAILING DATE July 10, 1997

NOTICE OF RIGHTS TO APPEAL

You are also entitles to seek judicial review of this Final Order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within sixty (60) days from the service of this Final Order. Judicial review is pursuant to the provisions of ORS 183.482.

FILED: July 15, 1998

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CLARK Z. COUCH,	)	
	)	
Petitioner,	)	
	)	Agency No. 61701
v.	)	
	)	
DEPARTMENT OF FISH AND WILDLIFE,	)	CA A99126
	)	
Respondent.	)	

Date argued or submitted on briefs: June 19, 1998

Before: De Muniz, Presiding Judge, and Deits, Chief Judge, and Haselton, Judge

Attorney for Petitioner: Clark Z. Couch, *pro se*

Attorney for Respondent: Michael D. Reynolds/ Denise G. Fjordbeck

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[X] No costs allowed.

IN THE SUPREME COURT OF THE STATE OF OREGON

CLARK Z COUCH Petitioner/Petitioner	)	
	)	ORDER DENYING REVIEW
v.	)	CA A99126
	)	SC S45724
DEPARTMENT OF FISH AND WILDLIFE, Respondent/Respondent	)	

The Court has considered the petition for review and orders that it be denied.

DATE: November 24, 1998.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

KULONGOSKI, J. , NOT PARTICIPATING

COPIES TO:

CLARK Z COUCH
Attorney for Petitioner/Petitioner

DENISE FJORDBECK
Attorney for Respondent/Respondent

IN THE SUPREME COURT OF THE STATE OF OREGON

CLARK Z. COUCH	)	Agency No. 61701
	)	
Petitioner,	)	
Petitioner on Review,	)	
	)	SC S45724
v.	)	CA A99126
	)	
DEPARTMENT OF FISH	)	
AND WILDLIFE,	)	
	)	
Respondent,	)	ORDER DENYING
Respondent on Review.	)	RECONSIDERATION

The Court has considered the petition for reconsideration and orders that it be denied.

Dated this 9th day of February 1999.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

Kulongoski, J. , not participating

c. Clark Z. Couch
Denise Fjordbeck

FILED: July 15, 1998

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CLARK Z. COUCH,	)	
	)	
Petitioner,	)	
	)	Agency No. 61701
v.	)	
	)	
DEPARTMENT OF FISH AND WILDLIFE,	)	
	)	CA A99126
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Attorney for Respondent: Michael D. Reynolds/ Denise G. Fjordbeck

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[X] No costs allowed.

Appellate Judgment COURT OF APPEALS

Effective Date: March 25, 1999 (seal)

APPELLATE JUDGMENT

OREGON REVISED STATUTES
Title 41. WILDLIFE
CHAPTER 498. HUNTING, ANGLING AND TRAPPING REGULATIONS;

498.002. Wildlife as state property; angling, hunting or trapping in violation of wildlife law or rules prohibited.

(1) Wildlife is property of the state. No person shall angle for, hunt, trap or possess, or assist another in angling for, hunting, trapping or possessing any wildlife in violation of the wildlife laws or of any rule promulgated pursuant thereto.

(2) No person shall angle for, hunt or trap, or assist another in anglig for, hunting or trapping any wildlife while intentionally violating ORS 164.245 to 164.270 or 498.120.

(1973 c. 723 sec. 73; 1993 c. 440 sec. 1)